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No. 86-1183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. - - - Petitioner

versus

CITY OF LOUISVILLE, KENTUCKY, Et Al. - - - - - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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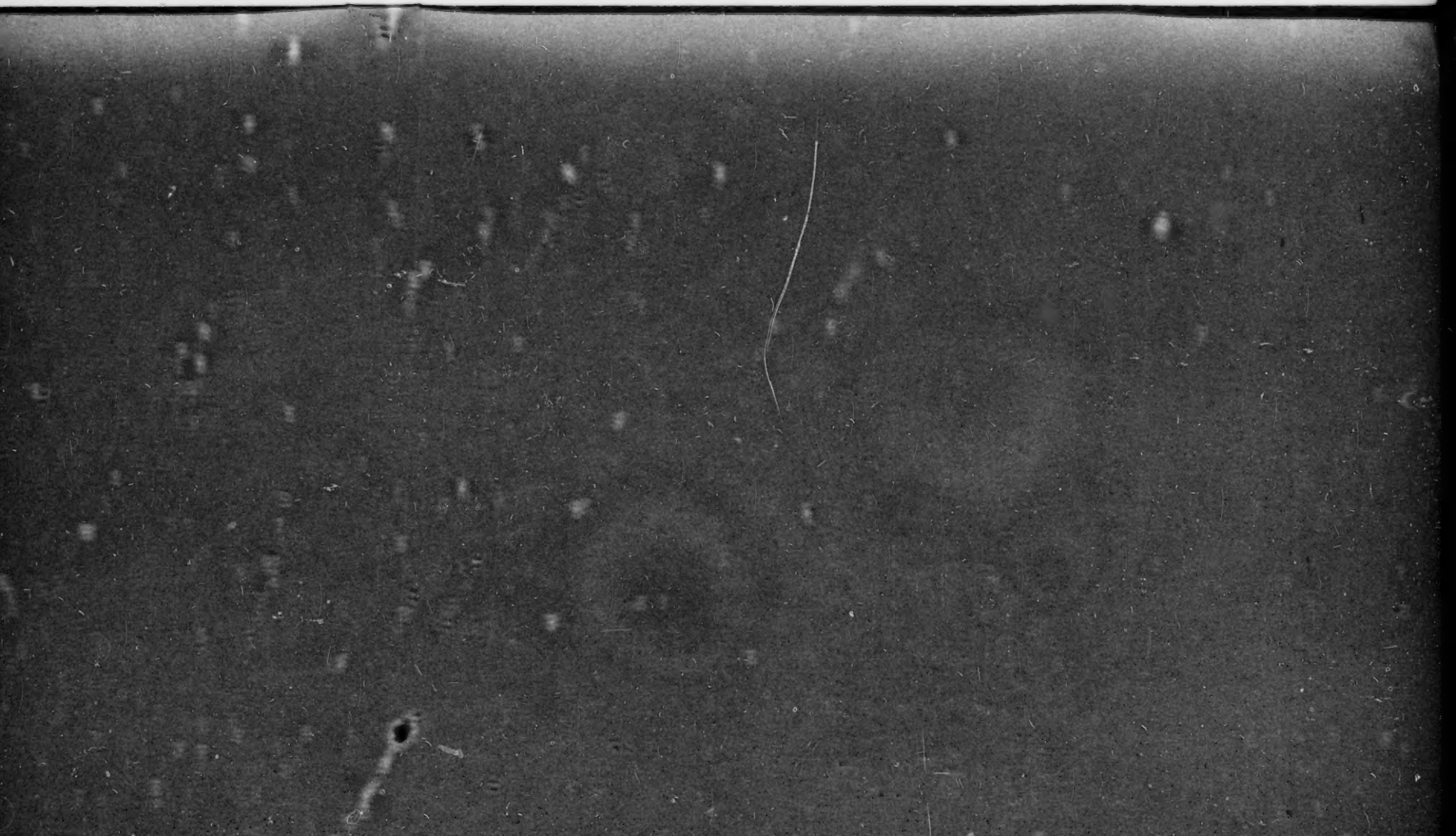

QUESTIONS PRESENTED

I. Whether the District Court's retroactive application of Kentucky's one-year personal injury statute of limitations was consistent with the standards set forth by this Court in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971).

II. Whether the District Court correctly applied Kentucky principles of *res judicata*/collateral estoppel as required by *Migra* v. *Warren City School District Board of Education,* 465 U. S. 75 (1984).

III. Whether petitioner's "hard core" conduct in purchasing a promotional examination deprived him of standing to challenge the vagueness of the police department rule for which he was discharged.

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No. 86-1183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. - - - *Petitioner*

v.

CITY OF LOUISVILLE, LOUISVILLE CIVIL SERVICE BOARD, DAVID THOMAS, WILLIAM STANSBURY, PHILIP SCHOLTZ, JON HIGGINS, ANTHONY TRUSTY, JAMES THORNBERRY, ANN DELOZIER, JAMES POWERS, GEORGE KINKEAD, JAMES CARR, AND GEORGE CLEMENT - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky is reported as *Fowler* v. *City of Louisville,* 625 F. Supp. 181 (W.D. Ky. 1985). Appendix to the Petition for Certiorari ("Pet. App."), Exhibit B, pp. 3-12. The decision without published opinion of the Court of Appeals for the Sixth Circuit is reported at 803 F. 2d 719 (6th Cir. 1986). Pet. App., Exhibit C.

COUNTERSTATEMENT OF THE CASE

Respondents reject petitioner's version of those facts which are based upon his own deposition. For the most part, petitioner's deposition consisted of incompetent and uncorroborated hearsay evidence. Respondents also reject petitioner's interpretations and conclusions based on the deposition testimony of respondents.

Respondents respectfully encourage the Court to scrutinize petitioner's statement of facts by reference to his citations to the record. The Court will then understand that respondents' virtual wholesale rejection of petitioner's conclusory facts is necessitated by his interweaving of occasional kernels of truth among, for the most part, uncorroborated and incompetent assertions of so-called facts.

Respondents instead adopt the facts contained in the memorandum opinion of the District Court, reported at 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd without opinion* 803 F. 2d 719 (6th Cir. 1986). Those facts are as follows (supplemented by references to the record where indicated):

In 1978, Petitioner was a lieutenant with the Louisville, Kentucky Division of Police. On September 8, 1978, petitioner was discharged from the police force because he paid $3,000 for what he believed were questions to an upcoming promotional examination for the position of captain. Petitioner intended to take the examination. Throughout all proceedings to date in

state and federal court, petitioner has admitted this conduct.

Petitioner appealed his discharge to the Louisville Civil Service Board, a body created by state law to hear appeals from disciplinary actions. Kentucky Revised Statute (K.R.S.) 90.190. Pet. App., Exhibit D, pp. 2-3. After a hearing conducted on November 21, 1978 at which petitioner was represented by counsel and evidence was introduced subject to cross examination, the Civil Service Board unanimously voted to sustain the action of the appointing authority. Pet. App., Exhibit A, pp. 1-2.

As allowed by state law, petitioner appealed the decision of the Civil Service Board by filing an action in the Jefferson Circuit Court. In his complaint, petitioner asked for reinstatement and damages on the grounds that he was denied equal protection of the laws and that he was not guilty of violating the Police Department rule with which he had been charged. Petition for Certiorari ("Pet."), pp. 12-21; Joint Appendix to the Sixth Circuit ("J.A."), pp. 158-159.

Although he *could* have, petitioner did *not* assert in his state court action for reinstatement that the rule with which he was charged was unconstitutionally vague or that he had been denied a fair hearing in his appeal to the Louisville Civil Service Board. Pet., pp. 12-13.

On April 29, 1982, the Jefferson Circuit Court upheld petitioner's dismissal from the police department. J.A., pp. 160-161.

As authorized by state law, KRS 90.190, petitioner took an appeal to the Kentucky Court of Appeals. On April 1, 1983, in an unreported opinion, the Kentucky Court of Appeals affirmed the judgment of the circuit Court. J.A., pp. 155-157. The opinion of the Court of Appeals became final on April 22, 1983 when petitioner declined to file a motion for discretionary review by the Supreme Court of Kentucky. Kentucky Rules of Civil Procedure 76.30(2)(a).

Having obtained the services of a new attorney, petitioner filed the instant 42 U.S.C. Section 1983 action in the United States District Court on September 6, 1983. Petitioner alleged that respondents violated his due process rights by discharging him pursuant to an unconstitutionally vague regulation of the Louisville Division of Police. Pet., p. 1; Pet. App., Exhibit D, p. 3: Rule 126, Section 12. Petitioner also alleged that respondents denied him a fair hearing in his appeal of his discharge to the Louisville Civil Service Board, Pet., p. 1.

After the taking of discovery, both parties filed motions for summary judgment and responses thereto. By order dated October 31, 1985, the District Court denied petitioner's motion for summary judgment and granted respondents' motion, thereby dismissing the action. A memorandum opinion reported at 625 F. Supp. 181 (W.D. Ky. 1985) accompanied the court's final order.

In its opinion, the District Court explained that the action was barred by the applicable statute of limita-

tions (one (1) year in Kentucky, K.R.S. 413.140) and was also barred by principles of *res judicata* or collateral estoppel. *Fowler* v. *City of Louisville,* 625 F. Supp. at 183-185.

The District Court also noted that petitioner's challenge as to the vagueness of the rule with which he was charged would not stand because his misconduct was so hard core that "any reasonable person would know that the misconduct would be cause for discipline or discharge. . . ." 625 F. Supp. at 185. The District Court agreed with the state trial judge in petitioner's earlier action "who found plaintiff's [petitioner] proffered reason for his conduct — that he purchased the examination to keep others from cheating — incredible." 625 F. Supp. at 185.

The District Court judgment was affirmed without a published opinion on September 30, 1986. *Fowler* v. *City of Louisville,* 803 F. 2d 719 (6th Cir. 1986).

REASONS FOR DENYING CERTIORARI

I. The District Court's Retroactive Application of Kentucky's One-Year Statute of Limitations is Consistent With the Standards Set Forth in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971).

In *Wilson* v. *Garcia,* ___ U. S. ___, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985), this Court held that the applicable statute of limitations for actions brought pursuant to 42 U.S.C. Section 1983 is the state statute of limitations relating to personal injuries. The applicable statute in Kentucky is K.R.S. 413.140 which

establishes a one (1) year statute of limitations for personal injury actions.

The District Court, citing to this Court's decision in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971), held that the decision in *Wilson* v. *Garcia* should be applied retrospectively. *Fowler* v. *City of Louisville,* 625 F. Supp. at 183. Subsequently, the United States Court of Appeals for the Sixth Circuit announced that within the Sixth Circuit, *Wilson* v. *Garcia* was to be applied retrospectively. *Mulligan* v. *Hazard,* 777 F. 2d 340 (6th Cir. 1985), *cert. denied,* ___ U. S. ___, 90 L. Ed. 2d 988, 106 S. Ct. 2902 (1986).

In his petition, petitioner states that on September 6, 1983, when he filed the instant action, the law in the Sixth Circuit was that Section 1983 claims filed in Kentucky for violation of due process in employment situations were governed by the five (5) year statute of limitations set forth in KRS 413.120(2).[1] Petitioner relies on *Garner* v. *Stephens,* 460 F. 2d 1144 (6th Cir. 1972) for this proposition. Pet. pp. 13-14. Petitioner thus implies that the first of the three-prong test set out by the Court in *Chevron Oil Co.* v. *Hudson* for nonretroactive application of the rule in *Wilson* v. *Garcia* has been met:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants

[1]Prior to *Wilson* v. *Garcia,* Kentucky's one (1) year statute, KRS 413.140, applied to Section 1983 actions analogous to tort actions, *e.g.,* assault, false arrest, malicious prosecution, personal injury, etc. *Carmicle* v. *Weddle,* 555 F. 2d 554 (6th Cir. 1977).

> may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . *Chevron Oil Co.*, 404 U. S. at 106.

Petitioner's reliance upon *Garner* v. *Stephens*, 460 F. 2d 1144 (6th Cir. 1972) is misplaced. At least since 1980, petitioner should have been on notice that a U. S. District Court in Kentucky had held that a Section 1983 claim for violation of due process (wrongful denial of hearing; claim for reinstatement) should properly be brought within one (1) year pursuant to K.R.S. 413.140. *Hines* v. *Board of Education of Covington, Kentucky*, 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd*, 667 F. 2d 564 (6th Cir. 1982).

In *Hines*, the District Court specifically noted the Sixth Circuit's decision in *Garner*, but explained that *Garner* had involved claims of discrimination based on sex, a type of action unknown to the common law. 492 F. Supp. at 472, n. 10. The District Court concluded that the appropriate Kentucky statute of limitation to be applied in *Hines* was the one (1) year statute provided in KRS 413.140.

The Sixth Circuit affirmed in a published opinion, *Hines* v. *Board of Education of Covington, Kentucky*, 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd*, 667 F. 2d 564 (6th Cir. 1982).

Thus, petitioner's rejection of the Sixth Circuit's retroactive rule in *Mulligan* v. *Hazard*, 777 F. 2d 340 (6th Cir. 1985), *cert. denied* ____ U. S. ____, 90 L. Ed. 2d 988, 106 S. Ct. 2902 (1986), as well as his implication that the District Court misapplied the *Chevron*

test in its application of the one (1) year Kentucky statute of limitations are both erroneous.

It should also be pointed out that this Court, in addition to *Mulligan,* has in at least seven instances recently denied certiorari from decisions applying *Wilson* v. *Garcia* retroactively: *Brady* v. *Pettit,* 762 F. 2d 1006 (6th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 110, ___ S. Ct. ___ (1985); *Hayes* v. *Cannon,* 753 F. 2d 1081 (9th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 230, ___ S. Ct. ___ (1985), *reh'g denied,* ___ U. S. ___, 88 L. Ed. 2d 566, ___ S. Ct. ___ (1985); *Gates* v. *Spinks,* 771 F. 2d 916 (5th Cir. 1985), *cert. denied,* ___ U. S. ___, 89 L. Ed. 2d 603, 106 S. Ct. 1378 (1986); *Jones* v. *Preuit & Maudlin,* 763 F. 2d 1250 (11th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 926, 106 S. Ct. 893 (1986); *Wycoff* v. *Menke,* 773 F. 2d 983 (8th Cir. 1985), *cert. denied,* ___ U. S. ___, 89 L. Ed. 2d 339, ___ S. Ct. ___ (1986); *Smith* v. *City of Pittsburg,* 764 F. 2d 188 (3rd Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 297, 106 S. Ct. 349 (1985); *Thomas* v. *Willis,* 786 F. 2d 1148 (3d Cir. 1986), *cert. denied,* ___ U. S. ___, 93 L. Ed. 2d 27, ___ S. Ct. ___ (1986).

Petitioner presents no facts which give rise to a new issue requiring review by this Court. The decision of the District Court, affirmed by the Sixth Circuit, is consistent with the standards for retroactivity set forth in *Chevron Oil Co.* v. *Hudson.*

II. The District Court Correctly Applied Kentucky Principles of *Res Judicata*/Collateral Estoppel as Required by *Migra V. Warren City School District Board of Education*, 465 U. S. 75 (1984).

Petitioner's Argument II presents no federal constitutional or statutory question that justifies the grant of writ of certiorari here. (Petitioner's Argument II appears to incorporate items II and III of his "Questions Presented for Review." Pet., p. i).

The District Court's ruling that petitioner's action was barred by principles of *res judicata*/collateral estoppel was a correct interpretation of Kentucky law.

This Court has recently held that under 28 U.S.C. Section 1738, state law governs the preclusive effect "as to a federal issue that a Section 1983 litigant could have raised but did not raise in the earlier state court proceeding." *Migra* v. *Warren City School District Board of Education,* 465 U. S. 75 (1984). The Court in *Migra* specifically rejected the federal plaintiff's argument that a state court judgment should only preclude a federal court Section 1983 action as to issues actually litigated in state court.

Kentucky courts have long recognized the doctrine that *res judicata* precludes relitigating matters previously litigated. This applies not only to points upon which the previous court was required to pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The doctrine not only embraces

matters technically involved, but it extends further and compels parties to bring forward and present to the court every fact then existing in support of the claim or in defense. *Combs* v. *Prestonburg Water Co.,* 260 Ky. 169, 84 S. W. 2d 15, 18 (1935).

In a later case, the Kentucky high court again held:

> The proposition that a litigant is precluded as to matters which he *could have* asserted (as well as to matters that actually were asserted) applies only to such matters as "properly were involved in the scope of the proceedings or belonged to the subject of the litigation," [citation omitted] . . . or the application of which would be to sustain or defeat the right asserted in the earlier proceeding [citation omitted].

Gilbert v. *Bowling Green Bank & Trust Company,* Ky., 460 S. W. 2d 14, 15 (1970) (Emphasis in original)

Recently, the Kentucky Court of Appeals, the state's intermediate appellate court, explained the holding in *Combs* regarding issue preclusion by holding that:

> . . . [T]hose issues which are germaine to, implied in, or so essentially connected with the actual issues in a previous case as to be involved in the scope of the proceedings are precluded from being raised in a later case between the parties or their privies.

Norell v. *Electric & Water Plant Board of the City of Frankfort,* Ky. App., 557 S. W. 2d 900, 902-903 (1977).

In pleadings before the District Court but most recently in his brief to the Sixth Circuit, petitioner

admitted that he could have asserted the due process claims alleged in his federal Section 1983 action in the earlier state court proceeding:

> The plaintiff readily admits that he could have, "made or tendered", [in the earlier state court proceeding] the issues of federal due process violations that he raised for the first time in the case at bar. However, under Kentucky law as set forth in *Bryan Brothers, supra,* he had no obligation to do so since these issues were simply, ". . . not necessary to support his cause of action." Petitioner's Brief to the Sixth Circuit, p. 24.

Petitioner's citation of *Bryan Brothers Packing Company* v. *Garrard* is incorrect. The citation should read, 386 S. W. 2d 469, 471 (Ky. 1965). Respondents encourage this Court to review the opinion in *Bryan Brothers,* including the passage quoted on page 21 of the petition for a writ of certiorari. As is clear from the holding in *Bryan Brothers,* Petitioner *was* in fact under an obligation to make or tender all issues necessary to support his cause of action for wrongful discharge.

Petitioner is simply wrong in his understanding of Kentucky law. The District Court, a respected former state trial judge,[2] in applying this Court's holding in *Migra,* obviously disagreed with petitioner's analysis of Kentucky's *res judicata* principles when he dismissed petitioner's complaint.

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[2] "Judge [Thomas A.] Ballentine [Jr.], an experienced jurist who had previously served as a judge of the Circuit Court in Kentucky . . ." *Wagner* v. *Harris,* 754 F. 2d 186, 191 (6th Cir. 1985).

In summary, this Court is not the appropriate forum to review *res judicata* principles under Kentucky law, absent a showing that Kentucky law conflicts with the U. S. Constitution or this Court's precedents construing federal statutes. Petitioner has made no such showing and there are therefore no special circumstances which justify disturbing the decision of the Sixth Circuit Court of Appeals and the District Court.

Moreover, if this Court chooses to review Kentucky law, it is clear that the District Court correctly applied Kentucky's *res judicata*/collateral estoppel principles in this case. Petitioner's attempt to split his cause of action in a piecemeal fashion was evident to the District Court, as it should also be to this Court.

III. Petitioner's "Hard Core" Conduct in Purchasing a Promotional Examination Deprived Him of Standing to Challenge the Vagueness of the Rule for Which Petitioner was Discharged.

(Petitioner's Argument III is identical to item IV of his "Questions Presented For Review" Pet., p. ii.).

Both parties moved for summary judgment before the District Court, supported by affidavits and depositions. Petitioner relied upon his own deposition to explain why he paid $3000 for the upcoming promotional examination. His explanation for this misconduct was that he purchased the examination questions to keep other officers from cheating. J.A., pp. 37-38.

In the earlier state court proceedings, the state trial judge disbelieved petitioner's explanation. Similarly,

in the case at bar, the District Court found petitioner's excuse "incredible." *Fowler* v. *City of Louisville,* 625 F. Supp. at 185. It is ironic that petitioner himself wanted the District Court to accept his self-serving explanation and then challenges the District Court's rejection of that explanation.

In any event, there is certainly presented no constitutional or federal statutory question justifying a grant of certiorari by this Court because the District Court refused to give credence to petitioner's farfetched excuse.

CONCLUSION

1. The District Court's application of Kentucky's one-year statute of limitations and the Sixth Circuit's retroactive application of *Wilson* v. *Garcia* were consistent with this Court's ruling in *Chevron Oil Co.* v. *Hudson.*

2. The District Court's application of Kentucky's *res judicata*/collateral estoppel principles was consistent with *Migra.*

3. The District Court correctly concluded that petitioner's "hard core" conduct prohibited him from challenging the vagueness of the rule for which petitioner was discharged.

The petitioner for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 28.3 I have served three (3) copies of this brief in opposition to the petition for certiorari upon the following attorneys, known by me to be counsel of record for petitioner, by mailing or delivering same to their respective offices on the ____ day of February, 1987: Cecil Davenport, Esq., 835 West Jefferson Street, Louisville, Kentucky 40202 and Phillip C. Kimball, Esq., 200 Kennedy Avenue, Louisville, Kentucky 40206, attorneys for petitioner.

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